Tracerco Asia Sdn Bhd v Nor Hisham Mohd Nordin & Ors

HIGH COURT (KUALA LUMPUR) — SIVIL SUIT NO 22NCC-1020 OF 2011
MARY LIM J
23 MAY 2012

Civil Procedure — Particulars — Further and better particulars — Whether plaintiff pleaded sufficient and necessary particulars of claim for defendants to respond — Whether affidavits filed by defendants in earlier interlocutory proceeding and their agreement to terms of consent order showed they clearly understood plaintiff's claim — Whether defendants failed to show it was necessary or desirable or there was any special reason why particulars sought should be ordered

The plaintiff and the fifth defendant were competitors in the oil and gas industry. The first to the fourth defendants were ex-employees of the plaintiff who had joined the fifth defendant. The plaintiff's instant action against the defendants was for breach of contractual obligations and confidence in that they had used confidential information or trade secrets belonging to the plaintiff for their benefit and to the plaintiff's detriment. To restrain the defendants from continuing to use such information or trade secrets, the plaintiff obtained an ex parte injunction which the defendants applied to set aside. While the fifth defendant's attempt to set aside the injunction was dismissed, the other defendants entered into a consent order agreeing to allow the injunction to continue in force until disposal of the suit. None of the defendants had filed a statement of defence in the action. Instead, they requested the plaintiff to provide further and better particulars of its claim to enable them to prepare their defence. When the requests were refused on the ground that what were sought were matters of evidence, the defendants applied to court to compel the plaintiff to provide the further and better particulars. For the hearing of the applications, the parties relied not only on the plaintiff's statement of claim but on all affidavits filed in relation to the injunction. While the defendants contended that the plaintiff's claim lacked particulars of the alleged confidential information or trade secrets and how they were allegedly used by the defendants, the plaintiff asserted that the particulars sought were evidentiary, irrelevant and not bona fide.

Held, dismissing the applications with costs:

(1) The plaintiff had pleaded sufficient and necessary material particulars of its claim for the defendants to respond. The particulars sought were substantially evidentiary in nature (see para 28).

(2) The defendants' affidavits revealed familiarity and clear understanding

and appreciation of the plaintiff's claims; how the defendants were involved and how they proposed to meet and answer those claims. The defendants or their deponents readily and with ease provided reasons for their assertions and contentions. It was reasonable to conclude such assertions and contentions could not have been made, and certainly not with such detail and ease, if the deponents did not know what information or material was under scrutiny or consideration (see paras 33, 38–39).

(3) While the fifth defendant made no appeal against the dismissal of its application to set aside the injunction, the first to fourth defendants consented to an interim injunction, agreeing to be prohibited from, inter alia, directly or indirectly using, copying, disclosing, divulging, communicating or procuring trade secrets and/or confidential information of the plaintiff. Such consent, coupled with the awareness of the consequences of non-compliance and the advantage of legal counsel at the material time, surely meant the defendants were fully aware of the identity of the confidential information or the trade secrets. The defendants' protestations were not borne out by the documents presented and their conduct (see paras 46–49).

(4) Under O 18 r 12(5) of the Rules of the High Court 1980, no order for particulars shall be made before service of the defence unless the court was of the opinion that the order was 'necessary or desirable to enable the defendant to plead or for some other special reason'. The reasons given by the defendants were not genuine — that it was at all necessary or desirable or that there was any special reason why the particulars sought should be ordered. In fact, the defendants appeared to be more than able to respond to the plaintiff's claim (see para 51).

[Bahasa Malaysia summary

Plaintif dan defendan kelima adalah pesaing dalam industri minyak dan gas. Defendan pertama hingga defendan keempat merupakan bekas pekerja plaintif yang mana telah bekerja dengan defendan kelima. Tindakan plaintif ini terhadap defendan-defendan adalah percanggahan kewajipan kontraktual dan kepercayaan di mana mereka telah menggunakan informasi sulit atau rahsia-rahsia perdagangan kepunyaan plaintif untuk faedah mereka dan detrimen plaintif. Untuk menghalang defendan-defendan daripada terus menggunakan informasi tersebut atau rahsia dagangan, plaintif telah memperoleh injunksi ex parte yang mana defendan-defendan memohon untuk diketepikan. Sementara usaha defendan kelima untuk mengetepikan injunksi ditolak, defendan-defendan yang lain telah memasuki perintah kebenaran mempersetujui untuk membenarkan injunksi tersebut untuk berkuatkuasa sehingga pelecutan guaman tersebut. Tiada seorang defendan pun yang telah memfailkan untuk pernyataan pembelaan untuk tindakan ini. Sebaliknya, mereka telah meminta plaintif untuk selanjutnya memberikan

butiran yang lebih baik untuk tuntutannya bagi membolehkan mereka untuk menyediakan pembelaan mereka. Apabila permintaan tersebut ditolak atas alasan bahawa apa yang diminta adalah perkara keterangan, defendan-defendan telah memohon kepada mahkamah untuk memaksa plaintif untuk mengemukakan butiran lanjut dan lebih baik. Untuk perbicaraan permohonan-permohonan tersebut, pihak-pihak telah bergantung bukan sahaja kepada penyataan tuntutan plaintif tetapi ke atas kesemua afidavit yang difailkan yang berkaitan dengan injunksi tersebut. Sementara defendan-defendan berhujah bahawa tuntutan plaintif kekurangan butiran untuk informasi sulit atau rahsia dagangan yang didakwa dan bagaimana ianya didakwa telah digunakan oleh defendan-defendan, plaintif menegaskan bahawa butiran-butiran yang diminta adalah bersifat keterangan, tidak relevan dan tidak bona fide.

Diputuskan, menolak permohonan-permohonan dengan kos:

(1) Plaintif telah memplid butiran material yang mencukupi dan perlu untuk tuntutannya bagi defendan untuk bertindakbalas. Butiran-butiran yang dipohon adalah bersifat keterangan yang substansial (lihat perenggan 28).

(2) Afidavit-afidavit defendan-defendan menunjukkan pengetahuan dan pemahaman yang jelas dan penelitian tentang tuntutan plaintif; bagaimana defendan-defendan terlibat dan bagaimana mereka bercadang untuk berjumpa dan menjawab tuntutan-tuntutan tersebut. Defendan-defendan atau deponen-deponen mereka dengan bersedia dan senang memberikan sebab-sebab untuk penegasan dan hujahan mereka. Adalah munasabah untuk memutuskan penegasan dan hujah sedemikian tidak dapat dibuat, dan semestinya bukan dengan teliti dan bersahaja, sekiranya deponen-deponen tidak tahu informasi atau material apa yang dibawah perhatian atau pertimbangan (lihat perenggan 33, 38–39).

(3) Sementara defendan kelima tidak membuat sebarang rayuan terhadap penolakan permohonannya untuk mengetepikan injunksi, defendan pertama hingga defendan keempat membenarkan injunksi interim, bersetuju untuk dihalang daripada, antara lain, secara terus atau tidak terus menggunakan, meniru, mengemukakan, mendedahkan, memberitahu atau memperoleh rahsia dagangan dan/atau informasi sulit plaintif. Kebenaran tersebut, digabungkan dengan kesedaran tentang akibat ketidakpatuhan dan kelebihan peguam perundangan pada masa matan tersebut, semestinya bermaksud defendan-defendan sedar sepenuhnya tentang identiti informasi sulit atau rahsia dagangan. Bantahan defendan-defendan tidak lahir daripada dokumen-dokumen yang dikemukakan dan tindakan mereka (lihat perenggan 46–49).

(4) Di bawah A 18 k 12(5) Kaedah-Kaedah Mahkamah Tinggi 1980, tidak terdapat butiran yang dibuat sebelum servis pembelaan melainkan

mahkamah berpendapat bahawa perintah adalah 'necessary or desirable to enable the defendant to plead or for some other special reason'. Sebab-sebab yang diberikan oleh defendan-defendan bukan sebenarnya — bahawa kesemuanya adalah perlu atau dikehendaki atau bahawa terdapat apa-apa sebab istimewa mengapa butiran-butiran diminta harus diperintahkan. Sebenarnya, defendan kelihatan lebih daripada boleh untuk memberi balasan kepada tuntutan plaintif (lihat perenggan 51).]

Notes

For cases on further and better particulars, see 2(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 5863–5878.

Cases referred to

Chiarapurk Jack & Ors v Haw Par Brothers International Ltd & Anor and Another Appeal [1993] 3 SLR 285, CA (folld)

Cm-Centres for Medical Innovation GMBH & Another v Phythopharm PLC [1999] Ch D 235, Ch D (refd)

Coco v AN Clark (Engineers) Ltd [1969] RPC 41, HC (folld)

Dato' Seri Dr Ling Liong Sik v Krishna Kumar s/o Sivasubramaniam [2002] 2 MLJ 278, HC (refd)

John Zinc Company Limited v Wilkinson & Another (1973) 23 RPC 717, CA (refd)

Ocular Sciences Ltd v Aspect Vision Care Ltd (No 2) [1997] RPC 289, Ch D (refd)

Skrine & Co v MBf Capital Bhd & Anor [1998] 3 MLJ 649, CA (folld)

Legislation referred to

Rules of the High Court 1980 O 18 r 12(1), (5)

Alvin Julian (Tracy Wong Tying Wueh with him) (Shearn Delamore) for the plaintiff.

Muhammad Faisal Moideen (Moideen & Max) for the first, second, third and fourth defendants.

Jonathan Yoon Weng Foong (Yoon Weng Foong) for the fifth defendant.

Mary Lim J:

[1] Enclosures 41 and 47 are the respective applications for further and better particulars by the first to fourth defendants, and the fifth defendant. For ease of reference, I shall thenceforth refer to the first to fourth defendants as the 'first set'. These applications followed the defendants' unsuccessful efforts to obtain such particulars through their exchange of letters.

[2] The first set of defendants is represented by Mr Muhammad Faisal

Moideen whereas the fifth defendant is represented by Mr Jonathan Yoon. The two applications are opposed by the plaintiff represented by Mr Alvin Julian.

RELEVANT CAUSE PAPERS

[3] Apart from the writ of summons and the statement of claim, the parties have relied on the following affidavits and affidavits in reply filed to date. These include the affidavits filed earlier in relation to the application for an interim injunction. The affidavits are arranged chronologically as follow:

(a) Yong Shyh Min's first affidavit affirmed on 16 June 2011 in support of the application for an interim injunction — encl 4;

(b) Nor Hisham Nordin's affidavit affirmed on 7 September 2011 in respect of the application to set aside the ex parte order of injunction — encl 19;

(c) Wong Chun Jee's affidavit affirmed on 7 September 2011 in respect of the application to set aside the ex parte order of injunction — encl 21;

(d) Yong Shyh Min's second affidavit affirmed on 21 September 2011 — encl 23;

(e) Nor Hisham Nordin's affidavit in reply affirmed on 18 October 2011 — encl 25;

(f) Wong Chun Jee's affidavit affirmed on 18 October 2011 — encl 26;

(g) Nor Hisham Nordin's affidavit in support affirmed on 23 February 2012 — encl 42;

(h) Yong Shyh Min's affidavit in reply affirmed on 12 March 2012 — encl 46;

(i) Zulkifli Mohd Sharif's affidavit affirmed on 23 March 2012 — encl 48;

(j) Nor Hisham Nordin's affidavit in reply affirmed on 29 March 2012 — encl 49;

(k) Yong Shyh Min's affidavit in reply affirmed on 19 April 2012 — encl 51; and

(l) Zulkifli Mohd Sharif's affidavit in reply affirmed on 9 May 2012 — encl 53.

[4] The exact details or particulars required of the plaintiff are substantially the same between the two sets of defendants. Those sought by the first set of defendants can be found in annexure A to the summons in chambers in encl 41 and they relate to paras 8(d), 21, 26 and 33 of the statement of claim. Those sought by the fifth defendant can be found at annexure I to the summons in chambers in encl 47 and they relate to paras 8(d), 18–23, 26–27, 29 and 32–35

of the statement of claim.

BACKGROUND FACTS

[5] The plaintiff is involved in the business of, inter alia, providing unique and specialised detection, diagnostic and measurement solutions for primarily the oil, gas and petrochemical industry. The first set of defendants comprises ex-employees of the plaintiff. They were engaged as applications engineers and had contracts of employments with the plaintiff. The fifth defendant is a company in which the first defendant is its operations officer and majority shareholder; and the second to the fourth defendants, its employees. Although initially established for general trade business, it subsequently ventured into the oil and gas service industry. Its business is similar to the plaintiff's.

[6] Sometime in March 2011, the plaintiff learnt that the first and third defendants together with the fifth defendant had been approaching and engaging with the plaintiff's existing clients, offering them the same or identical products and services rendered by the plaintiff. The plaintiff also learnt that the fifth defendant had been employed by one of the plaintiff's customers to undertake tasks that 'could have been provided by the plaintiff'. The plaintiff then found out that the fifth defendant had been engaging in the same business as the plaintiff and had offered similar or identical products and services.

[7] A general investigation revealed that the first set of defendants 'were managing and running the fifth defendant'. Through forensic investigations undertaken by KPMG Corporate Services Sdn Bhd and, from the plaintiff's own discovery of the documents, correspondence and chat conversations (in computers previously used by the first set of defendants) between the defendants, and between the defendants and others including the plaintiff's existing clients, as well comparisons of the fifth defendant's profile, prospectus, descriptions of products and services with the plaintiff's, the plaintiff came to the conclusion that the defendants had used the plaintiff's documents that are trade secrets and confidential information for the benefit of themselves and for the fifth defendant.

[8] The plaintiffs action against the defendants is in substance a claim for breach of contractual obligations and confidence; and use of confidential information or trade secrets to the detriment of the plaintiff and for the benefit of themselves and the fifth defendant. The reliefs sought include an order for an injunction of the defendants from using, copying, disclosing, divulging, communicating, procuring, utilising or disseminating the plaintiff's trade secrets and/or confidential information obtained directly or indirectly without the consent of the plaintiff.

[9] On 17 June 2011, the plaintiff obtained an ex parte injunction against the defendants restraining them from, inter alia, using confidential information or trade secrets belonging to the plaintiff. Applications to set aside the ex parte injunction order were then made.

[10] Initially, the parties opted to refer their matter to mediation but changed their minds at the last moment. On 6 January 2012, when the applications came up for disposal, the first set of defendants entered into a consent order with a limited scope on the injunction pending disposal of the action.

[11] As for the fifth defendant's application to set aside the ex parte order, that application was dismissed with costs on 14 February 2012 after hearing counsel. There was no appeal.

[12] Then followed the events that led to the present application. By letter dated 18 January 2012, the first set of defendants wrote to the plaintiff requesting for further and better particulars of the matters mentioned in appendix A. The plaintiff refused citing the matters sought were matters of evidence.

[13] Similarly, by letter dated 27 February 2012, the fifth defendant requested particulars of the matters set out in appendix I. That request, too, was refused by the plaintiff on the same basis as given to the first set of defendants.

[14] The present applications were then initiated on 23 February 2012 and 23 March 2012 for the first set of defendants and the fifth defendant respectively.

SUMMARY OF SUBMISSIONS

[15] Comprehensive written and oral submissions were made by all counsel. I summarise their submissions as follows.

[16] Mr Faisal submitted that the law required the plaintiff to plead with particularity the plaintiff's claim for breach of confidence; and that the parameters of the confidential information or trade secret set out in the pleadings. The plaintiff's statement of claim is said to be lacking in particulars in respect of, inter alia, the identification and particularisation of confidential information or trade secret and how the same were allegedly used by the defendants. The existing allegations were also said to be too broad and vague. Learned counsel then proceeded to deal with the affected paragraphs, expounding on the reasons already given and concluding with the contention

that the further and better particulars sought were bona fides, not matters of evidence or a fishing expedition but were matters that the defendants were entitled to know and which were relevant and critical to enable them to prepare their defence.

[17] Mr Yoon's submissions were substantially the same as Mr Faisal. Learned counsel contended that there was a 'fundamental need to limit the generality of the plaintiff's pleadings and by doing so, to clearly define the issues to be tried and more importantly, to tie the hands of the party(s) herein to their respective positions'. He, too, submitted that the plaintiff had failed, inter alia, to identify or give particulars of the exact confidential information or trade secrets which the plaintiff claimed to have developed and/or how the same was developed in order to show the prerequisites of confidence. Finally, learned counsel submitted that it was reasonable to conclude that there was a legitimate expectation that the plaintiff is required to plead all material facts on which it relies on for his claim; that it was 'fair and just for the plaintiff to provide the particulars asked for to enable the defendant to prepare his case'; and that 'the particulars asked for are fair and relevant'. He pointed out that an action of the present nature can amount to an instrument of oppression to prevent disclosure of general know-how or information which is not confidential at all fact.

[18] In their supporting affidavits, the first set of defendants said that the lack of information is prejudicial to their case whereas the fifth defendant said that it is unable to meet the plaintiff's case.

[19] The plaintiff's response is that the particulars sought relate to evidence and not fact; that the particulars sought were not material and/or relevant; particulars were already within the possession of the defendants; that the applications were not bona fide in nature and 'smacks of a fishing expedition'.

DETERMINATION

[20] Having given the applications the most careful consideration, I am satisfied that discretion ought not to be exercised in the defendants' favour in the circumstances of this case. I then dismissed both applications with costs of RM350 to be paid by each set of defendants and gave directions and time-lines on the filing of defences and reply, if any. I further fixed the case for further case management on 15 June 2012 with the trial scheduled for 20 July 2012.

[21] These are my reasons.

[22] If one were to examine the opening provisions in O 18 r 12(1) of the Rules of the High Court, it will be readily seen that it states:

> Subject to paragraph (2), every pleading must contain the *necessary particulars of any claim*, defence or other matter pleaded … (Emphasis added.]

[23] First and foremost, the plaintiff's claim is not spared the mandates and rules of pleadings requiring full and proper particularisation to meet the objects or functions reminded in *Dato' Seri Dr Ling Liong Sik v Krishna Kumar s/o Sivasubramaniam* [2002] 2 MLJ 278. After pointing out the various functions of particulars, Arifin Zakaria J (as the Lord Chief Justice then was) proceeded to set out those general principles at p 286:

> Firstly, particulars may only be sought of matters arising from the pleadings. Secondly, it is a matter of discretion of the court whether to grant an order of particulars … Finally, it should be; emphasised that particulars would not generally be ordered in respect of matters of evidence or inference drawn or substitute interrogatories.

[24] The defendants had sought to impress on the court that the nature of the plaintiff's claim called for the granting of an order that further and better particulars be provided on the paragraphs identified. Relying on a host of authorities that included *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, *Ocular Sciences Ltd v Aspect Vision Care Ltd (No 2)* [1997] RPC 289, *Skrine & Co v MBf Capital Bhd & Anor* [1998] 3 MLJ 649, *John Zinc Company Limited v Wilkinson & Another* (1973) 23 RPC 717 and *Chiarapurk Jack & Others v Haw Par Brothers International Ltd & Another & Another Appeal* [1993] 3 SLR 285, the defendants maintained that in an action for breach of confidence, the particulars sought must be divulged.

[25] So, the question is whether the necessary particulars of a claim for breach of breach of contractual obligations and confidence; and the use of the plaintiff's confidential information or trade secrets to the detriment of the plaintiff and for the benefit of themselves and the fifth defendant have been pleaded.

[26] The decisions of *Ocular Sciences Ltd v Aspect Vision Care Ltd (No 2)*, *Cm-Centres for Medical Innovation GMBH & Another v Phythopharm PLC* [1999] Ch D 235; *John Zinc Company Limited v Wilkinson & Another* and *Chiarapurk Jack & Others v Haw Par Brothers International Ltd* concern, inter alia, claims of similar nature, and are of much assistance. These decisions remind the need to identify and plead clearly the confidential information on which the plaintiff intends to rely in the proceedings; the circumstances of confidence; the information which can be shown to be of the type which could be treated as confidential; and that it was in fact used without licence or consent.

[27] In *Ocular Sciences Ltd v Aspect Vision Care Ltd*, at p 359, Laddie J expressed the view that the 'rules relating to the particularity of pleadings apply to breach of confidence actions as they apply to all other proceedings. The courts are therefore careful to ensure that the plaintiff gives full and proper particulars of all the confidential information on which he intends to rely on in the proceedings.' He then proceeded to deal with the consequences of non-compliance of such rules, the inferences that may be drawn by the court, cautioning that such actions are liable to be struck out if found to be abuses of process or where the claims are found to be instruments of oppression or harassment against the defendant.

[28] In my view, the answers to all these questions are in the affirmative. The plaintiff has pleaded sufficient and necessary material particulars of its claims for the defendants to respond. In any case, I agree with the plaintiff that the matters sought are substantially evidentiary in nature.

[29] In this respect, the statement of claim will first be examined followed by the affidavits. From the statement of claim, the trade secrets or confidential information that forms the basis of the plaintiff's claim involve those documents that were downloaded from the plaintiff's mainframe and used as templates for the fifth defendant's products. The first set of defendants is alleged to have used the plaintiff's confidential information as templates to be replicated for the fifth defendant's benefit due to the similarities or close proximity of the fifth defendant's profile, prospectus and description of products and services to those belonging; to the plaintiff. The plaintiff had also specifically identified 'FMD' or 'Flood Member Detection' which it claimed to be a 'fundamental area' of its business as having been used by the defendants.

[30] The circumstances of confidence, that is, the contractual relationship of the parties, the contracts of employment with the plaintiff and how the fifth defendant was established and how the information could have been accessed by the defendants are also pleaded. At this point, it can be said that the information identified is of the type which could be treated as confidential. There is further obvious use of the same without the plaintiff's consent.

[31] And, all this is just from the statement of claim.

[32] Since the parties have chosen to rely on the affidavits filed to date, which affidavits were filed in relation to the injunctive order, the court has also scrutinised them in substantial detail. And, I have found that these affidavits have been extremely telling. After examining these affidavits very carefully and closely, I find that I am fortified in my view by the contents of these affidavits, in particular, those of the defendants'.

[33] While the deponents of the defendants' affidavits have been careful not to admit or be deemed to having admitted the plaintiff's claim, the deponents were not in the least troubled, hesitant, prejudiced or embarrassed in putting their respective case. On the contrary, the affidavits reveal familiarity, and reflect the defendants' clear understanding and appreciation of the plaintiffs claims, how the defendants are involved, and how the defendants propose to meet and answer those claims. These deponents have, in addition, elaborated and amplified on the information concerned.

[34] Just as an illustration, in Nor Hisham Nordin's affidavit affirmed on 7 September 2011 (encl 19), Wong Chun Jee's affidavit affirmed on 7 September 2011 (encl 21) as well as the other subsequent affidavits in reply, it can be readily seen that the deponents spent considerable time disputing the status of various matters as confidential information or trade secrets. These included the Flooded Member Detection, Gamma Ray Transmission, proposals relating to the 'Shell Philippines Mercury Scan' and the 'ScanTech Gamma Scan Solvent Regenerator', company profile, and job rates.

[35] These affidavits were filed in opposition to the application for an interim injunction. At para 8 of Nor Hisham Nordin's affidavit in encl 19, he expressed the view that the 'terms of the said order is too wide, imprecise and vague. In this regard, I state that the terms contained therein are unjust and inequitable as it has been deliberately drafted in wide and ambiguous terms whereby the plaintiff is seeking to restrain the defendants from lawful trade'.

[36] At para 11, the deponent proceeded to say that he was advised by his solicitors and that he 'verily believe and state that the plaintiff cannot be allowed to protect any and every type of information but only information which qualifies as confidential information or trade secret can be protected under law'. At para 12, he then took the position that the 'said order and/or the plaintiffs affidavit and/or statement of claim fail to identify the alleged confidential information or trade secret which it seeks to protect. In this regard, the plaintiffs averments fail to particularise what are the alleged confidential information or trade secret and how it is confidential or exclusive to the plaintiff'. This is amplified in several other paras such as 13–14 and 31–32.

[37] However, from paras 16–21, the deponent took pains to describe in detail one diagnostic service and technique, that is the Flooded Member Detection; and why the plaintiff was said not to have any sole or exclusive right over its use. This is repeated at paras 45–46 and 75–77. In the rest of the affidavit at encl 19, the deponent responded at for example paras 80–81, 83–84, 86–87, 88, 90 and 98 to various documents, contending and explaining why these documents are not or cannot be treated as confidential, information.

[38] The fourth defendant's affidavit found in encl 21 is similarly drafted. He, too, averred that the Flooded Member Detection technique is not confidential information belonging to the plaintiff and gave his reasons for this view. In their subsequent affidavits in reply, these deponents went into further detail and dispute as to their assertions and contentions.

[39] As illustrated, the defendants or the deponents have readily and with ease, provided reasons for their assertions and contentions. It is reasonable to conclude that such assertions and contentions could not have been made and certainly not with such detail and ease if the deponents not known what information or material is under scrutiny or consideration.

[40] In such circumstances, I find it extremely difficult to accept that the defendants can still make the complaints that they made; or make a valid and convincing argument of these complaints.

[41] There is further the matter of the consent order relating to the injunction and the fifth defendant's conduct in relation to the order of an interim injunction made against it. These are extremely material and relevant considerations here.

[42] Insofar as the fifth defendant is concerned, its application to set aside the interim order of injunction was dismissed with costs on 14 February 2012. As mentioned at the outset, there was no appeal.

[43] These are the terms of the consent order dated 6 January 2012 reached between the plaintiff and the first set of defendants:

> ADALAH DENGAN INI DIPERINTAHKAN SECARA PERSETUJUAN bahawa:
>
> (a) suatu injunksi interim diberikan untuk menahan Defendan Pertama hingga Defendan Keempat sama ada dengan sendiri secara bersama dan/atau berasingan dan/atau melalui agen-agennya dan/atau pengkhidmat-pengkhidmatnya dan/atau mana-mana orang lain daripada dalam apa cara jua menggunakan, menyalin, mendedahkan, membocorkan, memaklumkan, mendapatkan, menggunapakai atau menyebarkan rahsia perdagangan dan/atau maklumat sulit Plaintif yang diperolehi sama ada secara langsung atau tidak langsung daripada Plaintif tanpa kebenarannya sama ada bagi niat dan tujuan Defendan-Defendan sendiri dan/atau untuk mana-mana pihak ketiga sementara menunggu pelupusan perbicaraan penuh tindakan ini tertakluk kepada syarat berikut:
>
> (i) tafsiran frasa maklumat sulit seperti yang dinyatakan di dalam

Klausa 24 kontrak-kontrak pekerjaan yang telah ditandatangani oleh Defendan Pertama hingga Defendan Keempat masing-masing; dan

(ii) Perintah ini tidak akan memprejudiskan hak Defendan Pertama hingga Defendan Keempat untuk mencabar klausa 24 tersebut pada perbicaraan penuh kelak.

[44] Aside for the issue of the interpretation and determination of cl 24 of the employment contract, the order of an interim injunction was substantially in the same terms as prayer (a) above. In short, the order was not subject to the two conditions found in (i) and (ii) above.

[45] It is trite that the terms of any order of injunction need to be precise, exact and clear. Otherwise, compliance and enforcement may become difficult and awkward issues. The courts have expressed such concerns numerous times, including in the same decisions that the defendants now rely on. The defendants in fact, made this complaint in their affidavits; see for example paras 37–42 of Nor Hisham Nordin's affidavit in encl 19.

[46] Yet, in the case of the first four defendants, they have been able to reach consent terms on the order for an interim injunction. A perusal of the consent terms shows that the defendants have agreed to be prohibited under an order of an injunction from inter alia directly or indirectly using, copying, disclosing, divulging, communicating, procuring trade secrets and/or confidential information of the plaintiff. In my view, such consent coupled the awareness of the consequence of non-compliance and the advantage of legal counsel at the material time must surely mean that the defendants are fully aware of the identity of the confidential information, or even the trade secrets.

[47] These defendants have further been able to agree on the disposal of the trial, that plaintiff's claim be disposed by a determination and interpretation of cl 24 of the employment contract.

[48] A quick perusal of cl 24 shows that there are some definitions or parameters of what the parties consider as 'confidential information' or trade secrets. This is what cl 24 states:

24. UNDERTAKING OF CONFIDENTIALITY

You will, during the course of your employment have access to confidential and business sensitive information of the Company and/or Group Company. You agree that, you will not at any time during your employment nor at any time after its termination (except in the proper course of your duties or otherwise with the prior consent in writing of the Company) directly or indirectly use, copy, disclose, divulge or communicate or procure or allow or permit to be used, copied, disclosed,

divulged or communicated to any person, firm, company or organisation any trade secrets or confidential information relating to the Company and/or Group Company or its or their agents, customers or suppliers which you may have received or obtained or had access to during your employment by the Company.

For the purposes of this agreement, 'confidential information' shall include information relating to the business and/or the financial affairs of the company and/or Group Company or any of its or their agents, customers, prospective customers or suppliers and in particular, shall include:

(1.1) the business methods and information of the Company or Group Company (including revenues, prices charged, discounts given to customers or obtained from suppliers, forecasts, plans, budgets, product development, rates, margin and profit figures, computer programmes and technologies, potential acquisitions, equity investments, or other financial information);

(1.2) lists and particulars of the Company's or Group Company's suppliers, customers and prospective customers and the individual contacts at such suppliers and customers;

(1.3) details and terms of the Company's or Group Company's agreements with suppliers and customers;

(1.4) secret manufacturing or production processes or formulae or know how employed by the Company or Group Company or its or their suppliers;

(1.5) details as to the design of the Company's or Group Company's or its or their supplier's products and inventions or developments relating to future products;

(1.6) details of any promotions or future promotions or marketing strategies and plans or publicity exercises planned by the Company or Group Company;

(1.7) details of any business plans of the Company or Group Company; and

(1.8) any information which may affect the value of the business or the shares of the Company or Group Company; and whether or not in the case of documents or other written materials, they are or were marked as confidential and whether or not, in the case of other information, such information is identified or treated by the Company or Group Company as being confidential.

(2.) This restriction shall apply without limit in time but will cease to apply to any confidential information which:

(2.1) you are authorised in writing to disclose by the board of directors at the Company or Group Company, as the case may be;

(2.2) had entered into the public domain unless it entered the public domain as the result of an unauthorised disclosure by you or an authorised disclosure for an unauthorised purpose by you or anyone else employed or engaged by the Company or Group Company;

(2.3) you are required to disclose by law.

> Should you breach any of the rules set out in this clause, you may be subject to disciplinary action which could result in summary dismissal.
>
> For the purposes of this Agreement, 'Group Company' shall mean Dialog Systems Sdn Bhd and/or Tracerco, a subsidiary of Johnson Matthey Pic.

[49] With the benefit of the employment contract in question, the affidavits and the statement of claim, the consent order, the order for an interim injunction, it becomes even clearer why the objections of the plaintiff have merit. The plaintiff's claim and the defendants' applications for further and better particulars must be viewed in the light of all these facts and circumstances. The defendants' protestations are not borne out by the documents presented and their own conduct to date.

[50] In any case, the provisions of O 18 r 12(5) of the Rules of the High Court 1980 must be properly appreciated. It states:

> An order under this rule shall not be made before the service of the defence unless, in the opinion of the Court, the order is necessary or desirable to enable the defendant to plead or for some other special reason.

[51] In the present case, no defence has been filed. This is significant as O 18 r 12(5) which is couched in negative or prohibitive terms provides that no order for particulars 'shall be made before the service of the defence unless' the court is of the opinion that the order is 'necessary or desirable to enable the defendant to plead or for some other special reason'. In other words, where the defendants have yet to file their defences; the starting point or the rule is not to order the giving of particulars unless the court finds it necessary or desirable to enable the defendant to plead its case; or if there are special reasons.

[52] From the deliberations set out earlier, it is quite apparent that the statement of claim contains the necessary particulars of the plaintiff's claim for breach of breach of contractual obligations and confidence; and the use of the plaintiff's confidential information or trade secrets to the detriment of the plaintiff and for the benefit of themselves and the fifth defendant. The affidavits, consent order and the terms of the injunction fortify that conclusion.

[53] Furthermore, the conditions and circumstances presented in the authorities cited are entirely different from those present in the instant case. The cases cited either concerned applications for further and better particulars after defence or statement of claim had been filed; or if before defence was filed as was the position in *John Zinc*, there was no parallel injunctive order; and most importantly, no injunctive order reached by consent. Insofar as the fifth

defendant is concerned, I find that this defendant was also quite content to leave the injunction in its present state, which echo and accords with the pleaded claim.

[54] Even in *Dato' Seri Dr Ling Liong Sik v Krishna Kumar s/o Sivasubramaniam*, the parties had already filed their respective amended statement of claim, amended defence and reply.

[55] Parties cannot always expect the pleadings to be in neat parcels despite the provisions in the Rules of the High Court 1980 on how pleadings are to be structured. Parties continue to tell their tales in the manner best suit them, staying as close to the rules of good and proper pleading.

[56] Having examined the deliberations of both judges in *John Zinc Company Limited v Wilkinson & Another*, I note that Edmund-Davies LJ did not appear to agree with Russell LJ although both judges reached the same conclusion. His Lordship did not view applications for further and better particulars as dependent on 'when'. He did not believe that claims relating to trade secrets should be put into a special class of their own. Ultimately, such claims fall to be regarded like any other. Further and better particulars ought to be ordered when, in the opinion of the court, it is necessary or desirable to enable the defendant to plead, or for some other special reason, that the plaintiff is to be ordered to give particulars before defence, then accordingly, he should be ordered to do so.

[57] This is, in fact, the precise direction of O 18 r 12(5).

[58] From the above, I therefore do not find the reasons given by any of the defendants genuine, that it is at all necessary or desirable, or that there is any special reason why the particulars sought be ordered. In fact, the defendants appear more than able to respond to the plaintiff's claim. Contrary to their claims, as more than adequately illustrated in the affidavits filed for the defendants, I do not find that any defences that the defendants propose to file will be in the nature of bare denials, or anywhere close to that.

[59] The applications are therefore dismissed with costs of RM350 to the plaintiff to be paid by each set of defendants.

Applications dismissed with costs.

Reported by Ashok Kumar